Sup. Ct. # 84149

IN THE
SUPREME COURT OF MISSOURI

EDWARD L. WILKES,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Denial of Postconviction Relief
Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 8
The Honorable Lee E. Wells, Presiding Judge

APPELLANT'S SUBSTITUTE BRIEF

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Appellant, Edward L. Wilkes, appeals the denial of his Rule 29.15 motion for postconviction relief by the Circuit Court of Jackson County. Mr. Wilkes was found guilty after a jury trial of one count of second degree murder, Section 565.021, RSMo 1994, one count of first degree assault, Section 565.050, RSMo 1994, and two counts of armed criminal action, Section 571.015, RSMo 1994. The Honorable Lee E. Wells, Presiding Judge, sentenced Mr. Wilkes, according to the jury's recommendation, to life imprisonment for Count I of second degree murder, fifty years imprisonment for Count II of armed criminal action, life imprisonment for Count III of first degree assault, and fifty years imprisonment for Count IV of armed criminal action. The court ordered the sentence of Count I to run concurrently with the sentence of Count II, the sentence of Count III to run concurrently with the sentence of Count IV, and the sentences of Counts I and II to run consecutively to the sentences of Counts III and IV.

The Missouri Court of Appeals, Western District, issued its mandate affirming Mr. Wilkes' convictions and sentences on direct appeal on December 23, 1999. Mr. Wilkes timely filed a pro se Rule 29.15 motion on March 3, 2000, and appointed counsel timely filed an amended motion on June 13, 2000. On January 19, 2001, the motion court denied Mr. Wilkes' postconviction claims without an evidentiary hearing. Notice of Appeal was timely filed on February 27, 2001.

On October 23, 2001, the Court of Appeals affirmed the denial of Mr. Wilkes' Rule 29.15 motion for postconviction relief. On November 7, 2001, Mr. Wilkes timely filed a motion for rehearing or, in the alternative, application for transfer, which was

denied on December 4, 2001. On December 19, 2001, Mr. Wilkes timely filed an application for transfer with this Court. On January 22, 2002, this Court sustained Mr. Wilkes' application for transfer. Therefore, the Missouri Supreme Court has jurisdiction to review this case.

STATEMENT OF FACTS

The State charged Appellant, Edward L. Wilkes, by Indictment filed in Jackson County Case Number CR96-0608 with Count I of second degree murder, Section 565.021, RSMo 1994, Count II of armed criminal action, Section 571.015, RSMo 1994, Count III of first degree assault, Section 565.050, RSMo 1994, and Count IV of armed criminal action, Section 571.015, RSMo 1994 (L.F. 1-3).[1] Specifically, he was charged with shooting Kenneth Moore, which resulted in Mr. Moore's death, and shooting Gary Singleton (L.F. 1-3).

The case was first brought to trial on December 15, 1997, but the jury was unable to reach a unanimous decision (L.F. 17-18, 1st Tr. 2-3, 489-490). On June 1, 1998, the case again proceeded to jury trial before the Honorable Lee E. Wells, Judge of Division 8 (Tr. 13). At trial, the following evidence was adduced.

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[1] The Record on Appeal consists of the direct appeal legal file filed in WD# 56304 (referenced "L.F."), the transcript filed in WD# 56304 (referenced "Tr."), and a postconviction legal file filed in the present appeal (referenced as "PCR L.F."). Undersigned counsel will also attempt to submit, as a supplemental transcript, the trial transcript from the first trial in the underlying criminal case, which trial resulted in a hung jury (referenced "1st Tr."). Undersigned counsel will also ask the state to submit State's Exhibit 58, the photospread containing Mr. Wilkes' picture, and State's Exhibits 48-51, photographs of Amy Fields' Escort.

Gary Singleton and his "best friend," Kenneth Moore, worked at Joe's Unlimited, which was a car detailing company (Tr. 175-177). The employees of Joe's Unlimited prepared several cars for a car show at Bartle Hall on February 1, 1996 (Tr. 177, 178). During the morning of February 1, 1996, Mr. Singleton and Mr. Moore were at Bartle Hall (Tr. 178). Mr. Moore later took Mr. Singleton home in Mr. Moore's Toyota Celica or Corolla (Tr. 178-179).[2] Later, at 8:00 or 8:30 that evening, Mr. Singleton "might have had a sip of beer" and "hit [on a marijuana cigarette] a couple of times" (Tr. 181-182, 183, 213-214, 216).[3]

At approximately 8: 30 p.m. or 9 p.m., Mr. Moore picked up Mr. Singleton, and the two eventually went back to Bartle Hall to "meet some gentlemen over there" or to wait for Mr. Moore's brother, Joe (Tr. 181, 183, 188, 234). They parked the car on 16th Street, just east of Broadway, near Bartle Hall in Kansas City, Jackson County, Missouri

[2] Mr. Singleton testified that his best friend's car was a Toyota Celica or Corolla, but evidently it was a Toyota Tercel (Tr. 157, 337, 340).

[3] Although blood drawn from Mr. Singleton at 11:15 p.m. on February 1, 1996, indicated the presence of opiates in his system, he denied having any heroin or opiates in his system that night (Tr. 216-217, 218-219, 288-289). Hospital records also reflected that Mr. Singleton told hospital employees that he had two drinks of alcohol that night, but Mr. Singleton also denied this and testified that that meant two sips of a beer (Tr. 220, 287). Mr. Singleton testified at trial that the marijuana and alcohol did not have any effect on him (Tr. 182).

(Tr. 156-157, 184). Mr. Moore talked on his cell phone and argued with his girlfriend (Tr. 185-186). Mr. Moore also called Joe, who was at the car show, two or three times in an attempt to get Joe to come to the car so that they could go somewhere to eat (Tr. 188). While they were waiting in the car for Joe, Mr. Moore told Mr. Singleton that "some guys keep paging" (Tr. 188, 234).

Mr. Moore was eating candy when a "dusty, sky blue Escort" with two men in it drove by (Tr. 189, 233, 297). The Escort drove past on the opposite side of the street and parked "maybe two, maybe three car lengths on the opposite side of the street . . . facing the other direction" (Tr. 189, 231, 232, 297). Mr. Moore asked Mr. Singleton to retrieve some more candy from the back seat, and Mr. Singleton got out of the car to get into the back seat (Tr. 189).[4] As he got out of the car to go into the back seat, he saw "guys walking up, but [he] never paid attention to them" (Tr. 233).

After he was in the back seat of the car, he gave the candy to Mr. Moore, and two men were at the door (Tr. 189, 193, 236). Somebody said, "[h]ey, man," and a man, who was standing "directly" at the door shot Mr. Moore in the head (Tr. 191, 192, 193). Then, the man pointed the gun at Mr. Singleton (Tr. 192). Mr. Singleton hit the gun, and it went down (Tr. 192, 197, 278). The man shot Mr. Singleton as the gun was coming back up (Tr. 192, 197). Mr. Singleton and the shooter "connected eyes" through the side

[4] Mr. Singleton later testified that he was already in the back seat when he saw the blue Escort initially drive by the Toyota (Tr. 189).

window, and Mr. Singleton "played dead" (Tr. 193, 197, 279).[5] Mr. Singleton then looked out the back window and saw the two men get into the Escort (Tr. 198, 282).

At trial, Mr. Singleton described the shooting as follows: "I watched the hand come in, pow, pow, and went back out" (Tr. 193, 234, 278-279). He further testified that "it happened so fast" (Tr. 196-197, 234, 278). Mr. Singleton described the shooter as wearing a green coat and a black stocking cap "with nothing on it" or a brown cap "with little balls on it" (Tr. 235, 273, 274-275).[6]

Although Mr. Singleton testified at trial that the perpetrators stood outside the car, he made a tape-recorded statement to the police on February 8, 1996, wherein he told the police: that he got out of the car, that he let one of the perpetrators into the front passenger seat, that he got into the back seat, and that one of the perpetrators conversed with Mr. Moore about the price of a car prior to the shooting (Tr. 239-243, 295, 297-

[5] At the first trial, Mr. Singleton testified on one occasion that "[w]hen I got shot, our eyes connected because I was looking out the back [big] window. Our faces connected" (Tr. 280-281, 284, 285-286).

[6] Mr. Singleton testified at the first trial that one perpetrator had on "a brown cap pulled so far you could hardly see him [and] [t]he other guy had a green cap and green jacket on" (Tr. 274-275).

298). In the taped statement, there was no mention of Mr. Singleton going to the back seat to retrieve a bag of candy (Tr. 244).[7]

An independent witness, Reece Good, who was leaving Bartle Hall at approximately 10:45 that evening and was within view of 16th Street, heard "like a firecracker going off" (Tr. 347-348). Approximately thirty to forty seconds later, he saw two men "running down the street, getting in a car and taking off" (Tr. 347, 349, 354). He was unable to tell the race of the two men, since it was dark outside and he viewed them from the back from approximately 60 feet (Tr. 350, 355). When Mr. Good initially talked to police, he stated that the two men got into a car that was "a small like a Ford Escort-type or Dodge Omni-styled vehicle" and was "boxy" in shape (Tr. 353-354, 356). At trial, however, Mr. Good described the car as "possibly" a Ford Escort hatchback (Tr. 350). The Ford Escort was "silver or light blue" or "could have been dirty . . . from the salt on the roads" (Tr. 350-351, 356). The car was parked approximately "100 feet" down from the Toyota, was on the opposite side of the street of the Toyota, and was facing the opposite direction of the Toyota; the men headed east in the car and did not

[7]At trial, Mr. Singleton explained the inconsistency by testifying that Detective Pete Smith "was trying to throw words in my mouth" and was "being real rude to me" (Tr. 244, 245). Mr. Singleton testified at trial that the "truth" was that one of the perpetrators never entered the Toyota (Tr. 269-271). Mr. Singleton also explained that his memory was better at the time of trial than on February 8, 1996, since he was on medications at that time (Tr. 294-295).

turn on the headlights (Tr. 351, 355, 356-357). Other people were coming out of the car show at that time, and other cars were parked "all up and down that street" (Tr. 355-356).

At approximately 10:45 p.m. Kansas City police officer Frank was dispatched in regards to the shooting (Tr. 156). He arrived at the location approximately two minutes later and saw Mr. Moore, who had been shot in the right side of the face, "slumped back" in the driver's seat of the Toyota Tercel (Tr. 157-158, 169).

Officer Frank went to help Mr. Singleton, who had also been shot and was lying in front of the Toyota (Tr. 158, 163). Mr. Singleton was conscious and said that two men had shot Mr. Moore and him and fled the scene in a light blue Ford Escort (Tr. 158, 160, 163). In addition to the "suspect vehicle" being described as a blue Ford Escort, there were at least three other types of cars described as the "suspect vehicle" (Tr. 537, 540).

Mr. Singleton did not say that he knew the shooter (Tr. 163).[8] Officer Frank received information that both perpetrators were black men, one of the perpetrators wore a dark blue or black jacket, and the other perpetrator wore a waist-length black leather coat (Tr. 165, 172-173). Officer Frank recovered a loaded handgun from Mr. Moore's waistband (Tr. 169, 170, 171).

[8] At trial, Mr. Singleton testified that he did not provide any information regarding the perpetrators or the shooting to a police officer at the scene (Tr. 229-230).

Mr. Moore died as a result of the single gunshot wound to his head (Tr. 358). Mr. Singleton was taken by ambulance to St. Luke's Hospital (Tr. 199-200).[9]

From the crime scene, the police recovered a fired 9 millimeter copper-jacketed bullet from the area just west of the Toyota (St. Ex. 30), a fired .25 caliber bullet from the left front seat of the Toyota (St. Ex. 31), two fired casings from north of the Toyota (St. Ex. 32), a fired .25 caliber, 9 millimeter shell casing from the back left seat of the Toyota, a fired .25 caliber bullet from the trunk of the Toyota (St. Exs. 39, 40), and a casing from 16th Street (St. Ex. 33) (Tr. 315, 316-317, 338-339, 341, 359, 365-366, 368, 369). A fired, "flattened," 9 millimeter copper-jacketed bullet was also recovered from Mr. Moore by the medical examiner (St. Ex. 47) (Tr. 358, 368-369).

A firearms and toolmark examiner was unable to determine if the fired bullet from the trunk of the Toyota and the fired bullet from the left front seat of the Toyota were fired from the same gun (Tr. 366). The fired shell casing recovered from the passenger seat and the fired shell casing recovered from 16th Street were fired from the same unknown gun (Tr. 366). Both fired shell casings recovered north of the Toyota were also fired from the same unknown gun (Tr. 367). And the bullet recovered from Mr. Moore and the bullet recovered from the area in front the Toyota were fired from the same unknown gun (Tr. 369).

[9] Mr. Singleton remained in the hospital for the month of February (Tr. 200, 225). He had four or five surgeries as a result of being shot and, at the time of trial, was still unable to perform many physical tasks that he could do before (Tr. 200-201).

After surgery for the gunshot wound, Mr. Singleton "woke up" on Saturday, February 3, 1996 (Tr. 225). At first, Mr. Singleton did not know who shot him (Tr. 202, 221). According to Mr. Singleton, on February 8, 1996, he first spoke to the police about the shooting (Tr. 226, 244, 245, 261).[10] He gave his first statement concerning the shooting to Detective Pete Smith, who brought a burgundy book containing approximately ten pages of photographs (Tr. 226-227, 244, 245, 268). Mr. Singleton stated that he did not recognize any individuals depicted in the photographs in the burgundy book, and Detective Smith showed him additional photographs, one of which contained a picture of Mr. Wheeler and one of which contained a picture of Mr. Wilkes (Tr. 227-228).

After he spoke to Detective Smith for "a couple of minutes," Detective Smith turned on a tape recorder (Tr. 246). Detective Smith was "trying to put words in [his] mouth" and "was trying to say how it went down" (Tr. 247, 262). Detective Smith told Mr. Singleton that he and Mr. Moore were selling drugs, which Mr. Singleton denied (Tr. 262). Mr. Singleton felt like Detective Smith was trying to get him to say that Mr. Singleton and Mr. Moore were selling drugs and "something went wrong" (Tr. 262-263).

Although Mr. Singleton did not know initially who shot him, "[o]nce the officer came to [him] in [his] room and showed [him] the photos, I was like that was the guy, the one guy that bought the Daytons" (Tr. 202). At trial, Mr. Singleton explained that

[10] Mr. Singleton later testified that his conversation with the police on February 8, 1996, was the last time, and not the first time, that he spoke to police (Tr. 269).

Dayton wheels, which are "fancy," expensive, and used primarily for show, were sold by Joe's Unlimited to James Wheeler in approximately October 1995 (Tr. 203, 205, 206). At some point after Mr. Wheeler purchased the Dayton wheels and in approximately October 1995, Mr. Moore and Mr. Singleton delivered the Dayton wheels to Mr. Wheeler at Mr. Wilkes' house in Topeka, Kansas (Tr. 206, 275-276). Mr. Wilkes was present at the house at the time (Tr. 206, 275-276).[11] They waited there for Mr. Wheeler until he "finally" showed up (Tr. 206-207).

When the police showed Mr. Singleton the photograph of Mr. Wheeler, he recognized Mr. Wheeler as the person who bought the Dayton wheels but did not identify him as a person involved in the shooting (Tr. 204-205, 207). On February 8, 1996, the police showed him a photospread, which included a picture of Mr. Wilkes, and he identified Mr. Wilkes as being with Mr. Wheeler during the transactions involving the Dayton wheels and as being the shooter (Tr. 208, 240, 297).

At trial, Mr. Singleton also identified Mr. Wilkes as the shooter (Tr. 193-194). Mr. Singleton further testified that a photograph of Amy Field's blue Escort depicted the Escort he saw the night of the shooting (Tr. 190-191, 381-382, St. Exs. 48-51).

[11] In Mr. Singleton's taped statement to Detective Smith, Mr. Singleton did not state that he had delivered Dayton wheels to Mr. Wilkes' home (Tr. 276-277).

Amy Fields testified that she and her son lived at 2700 Kentucky in Topeka, Kansas, in late 1995 and early 1996 (Tr. 379).[12] Mr. Wilkes is the father of her son and lived with them "on and off when he wanted to" and also stayed at other places; Ms. Fields was "not really 100 percent sure where he really ever was" (Tr. 378-379, 425, 428). On prior occasions, Mr. Wilkes had lived with them and then left (Tr. 425-426, 433). For example, he lived with them in March 1995, said he was going to Atlanta for a couple of weeks, and then stayed in Atlanta for eight months until approximately November 1995 (Tr. 425-426, 433).[13]

Mr. Wilkes returned to Topeka in November 1995 and again stayed with them in approximately December 1995 and January 1996 (Tr. 378, 382, 424-425, 433). When he lived with Ms. Fields and their son, Mr. Wilkes often borrowed Ms. Fields' light blue, four-door 1989 Ford Escort LX (Tr. 380, 381-382, St. Exs. 48-51).

In December 1995 or January 1996, Ms. Fields met Kenneth Moore at her house in Topeka on one occasion when Mr. Moore and Mr. Wilkes were playing dominoes (Tr.

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[12] Ms. Fields testified that before the first trial, she asked an assistant prosecutor from the Jackson County prosecutor's office if there was any way that she "did not have to come" to court (Tr. 404). The assistant prosecutor told her that if she did not come, she would go to jail and her son would be placed in "SRS custody" (Tr. 404-405, 440-442).

[13] Mr. Wilkes' mother and sister also lived in Atlanta, and his father and brother lived in Topeka (Tr. 425, 427-428, 432).

380-381, 382, 428-429). There was also a man named "Gary" with Mr. Moore and Mr. Wilkes, and Ms. Fields believed that man to be Gary Singleton (Tr. 381, 429-430).

On February 1, 1996, she drove her Escort to work at approximately 3 p.m. (Tr. 384). At that time the fan belt on her Escort "squeaked" (Tr. 382, 386). At approximately 5:30 or 6 p.m., Mr. Wilkes called her at work and asked to borrow her Escort (Tr. 384-385). Mr. Wilkes said that he wanted to use her car to drive to Lawrence (Tr. 385). When he arrived at her work at approximately 5:30 to 6 p.m., he was with Lamont Jennings (Tr. 385, 387). Since she needed a car to pick up her son after work, Mr. Jennings left his car there (Tr. 386). Mr. Wilkes and Mr. Jennings explained to her that they would have problems with being pulled over by the police since they were black men and Mr. Jennings' car was a new Cadillac (Tr. 386).

After work, Ms. Fields picked up her son at approximately 12:15 a.m. and went home (Tr. 388). She and a friend stayed up drinking, and Ms. Fields drank six to seven beers (Tr. 389, 413). Although Ms. Fields was not clear on the time, she testified that after she had drank six to seven beers, Mr. Wilkes called her during the early morning hours of February 2, 1996 (Tr. 389, 412, 413). He said that he was at a Conoco or Amoco station getting the fan belt fixed on her Escort (Tr. 389). She could not initially recall if he told her that he was in Kansas City or if her caller id reflected that his call came from Kansas City but then testified that Mr. Wilkes told her that he was in Kansas City getting the fan belts fixed (Tr. 389-392, 414). She also testified that she "believed" the caller id also reflected that the call was coming from the "816" area code (Tr. 393).

At approximately 4:15 a.m., Mr. Wilkes came to her home (Tr. 394). When she drove her Escort the next day, the fan belt still squeaked (Tr. 394). At some point thereafter, she also saw two bullets in the glove compartment (Tr. 394-395, 417-418, 419). Ms. Fields testified that she "didn't really look at [the bullets] all that well. I opened my glove compartment and saw them, because I cleaned my car out the next day. I just kind of noticed them laying there. There was two of them and I couldn't tell you if they were full bullets, if they were shot. . . . I looked at them, and . . . closed the thing" (Tr. 395, 420, 422). Although she did not look closely at the bullets, she testified that they were "medium-size bullets" (Tr. 395). At trial she further testified that the bullets in the glove compartment were the same color and approximately the same size as the bullet recovered from the area west of the Toyota and the casing recovered from the back left seat of the Toyota (St. Exs. 30, 40) (Tr. 395-396).

At some point between February 1, 1996, and February 8, 1996, Mr. Wilkes called and told her that "[i]f anyone calls for me, tell them you haven't seen me …for a week" (Tr. 437). He also asked if anyone had called for him, which was not unusual (Tr. 437, 444). At some point, she asked Mr. Wilkes about the bullets, and he denied knowing about them (Tr. 396, 423).

During the early morning hours of February 8, 1996, Mr. Wilkes called her and asked her to come pick him up at "someone's house" (Tr. 423-424). She was angry but picked him up and took him to her home (Tr. 424). Then he left again (Tr. 424).

Later on February 8, 1996, three homicide detectives, including Detective Pete Smith, came to Ms. Fields' home; as she was pulling out of the driveway with her son in

the car, three of four police cars stopped her (Tr. 396-397, 398, 407, 408). One of the detectives directed her to step out of the car and told her that her car was used in a murder in Kansas City (Tr. 409). The detectives also told her that she could be charged with the murder or conspiracy to commit the murder, and she believed that they thought she was responsible (Tr. 409-411). They asked her "ten thousand questions," and she told them that, due to her drinking that night, the night was "blurry, little hazy to [her]" (Tr. 416).[14]

She agreed to let them search her home and her car (Tr. 396-397, 411, 476, 477). After the police asked her if she had seen any bullets in her car, she told the police about the bullets she saw in her Escort, but the bullets were no longer there (Tr. 397, 416-417). The police asked Ms. Fields what Mr. Wilkes was wearing on February 1, 1996; she stated that he was wearing a green winter coat and boots, which the police seized from her home along with Mr. Wilkes' green Nike stocking cap (Tr. 430-432, 478, 517).

Later, Mr. Wilkes called her and "was just talking to [her] nonchalantly" (Tr. 397). She asked him about the homicide detectives coming to the house and the bullets, and Mr. Wilkes "was like completely in shock" and said he had no idea what the police were there for (Tr. 398).

[14] In Ms. Fields' recorded statement to the police and in her testimony at the first trial, she did not mention that she was drinking alcohol on the night of February 1, 1996 (Tr. 438). However, she testified that she told the police that at her home before they took her to the police station to record her statement (Tr. 446).

Mr. Wilkes called her after that, but the caller id did not reflect a location (Tr. 399). After the police visited her home and she told Mr. Wilkes about the police, he left, "which wasn't unusual for him," and she did not see him again for eight months (Tr. 400, 426-427).

According to Detective Headrick, when beginning the investigation of this case, the police had the phone records of Mr. Moore's cell phone and information from Joe Hill (of Joe's Unlimited) regarding tires being purchased by Delron and James Wheeler in Topeka (Tr. 469-470, 471). According to Detective Headrick, "[t]here were numerous phone calls to Topeka, and the tires were bought from someone in Topeka, and [the Wheelers] were potential suspects on our first trip" to Topeka (Tr. 470). The detectives contacted the Topeka police, who put together photospreads containing the Wheelers (Tr. 470, 471). The police also drove by the Wheelers' residence and looked for a car similar to a small blue "Escort-type vehicle" (Tr. 471).

When the police came back from Topeka, they had "two photospreads and several Poloroid pictures of residences and vehicles" (Tr. 472, St. Ex. 57A, B). On February 5, 1996, Detective Smith and Detective Headrick showed those two photospreads and the Poloroid pictures to Mr. Singleton (Tr. 472, 473, 527, 551). Mr. Singleton identified James Wheeler as being involved in the sale of the Dayton wheels (Tr. 473-474). Mr. Singleton then told the detectives that the person involved in the homicide had been with Mr. Wheeler (Tr. 474).

On February 8, 1996, the Topeka police advised the Kansas City detectives that they had stopped a car "used in a homicide in your city" (Tr. 475). Detective Smith and

Headrick then went to Topeka and met with Amy Fields at the Topeka police department (Tr. 475). Before Detective Headrick left the Topeka police department, the police put together two photospreads, one of which contained a picture of Mr. Wilkes and the other which contained a picture of Keith [Lamont] Jennings (Tr. 480, 482, 552).

On February 8, 1996, the police told Mr. Singleton that they had been to Topeka, developed more leads, and asked him to view the two additional photospreads (Tr. 481, 528). Mr. Singleton then identified Mr. Wilkes as the shooter (Tr. 483).

Mr. Wilkes was arrested later in Atlanta, Georgia area at his mother's house where he was then living (Tr. 484, 535-536). On October 9, 1996, Mr. Wilkes waived his Miranda rights and agreed to speak to the police (Tr. 486-487, 548). The interview lasted approximately two hours, and Mr. Wilkes denied involvement in the shooting (Tr. 489). Mr. Wilkes said that he had heard about Mr. Moore's murder, that he had known Mr. Moore for about four years, that the two were friends, and that he had sold drugs for Mr. Moore in Topeka (Tr. 489, 491, 512-513, 531). Mr. Wilkes also said that Mr. Moore had been to Ms. Fields' home several times and that Mr. Moore last visited Ms. Fields' home approximately three days before the homicide (Tr. 490). Mr. Wilkes also stated that he knew James Wheeler and that Mr. Wheeler sold "a large amount of drugs in Topeka" (Tr. 493, 534).

Mr. Wilkes said that Mr. Singleton "must have identified [Mr. Wilkes] as a suspect because [Mr. Wilkes was] the only person outside of Kansas City that he knew was associated with [Mr. Moore]" (Tr. 492). Mr. Wilkes said that Mr. Singleton "used him because he didn't want to tell the truth and identify the real killer" (Tr. 492).

Mr. Wilkes said that on the night of the homicide, he drove Ms. Fields' blue Escort and visited two friends, Nicky Love and Toby Martin, in Wichita (Tr. 490, 491). Mr. Wilkes stated that he also visited with a woman named "Rachel" at a Best Western Inn on the west side of Wichita (Tr. 490). Mr. Wilkes said that he left Wichita at approximately 2 a.m. to return to Topeka (Tr. 493). On the way back to Topeka, Mr. Wilkes called Ms. Fields from the Amoco station on Interstate 70 at Emporia and told her that he was in Kansas City "because he didn't want her to know he had been in Wichita" (Tr. 493).

At trial, the State introduced telephone records from Ms. Fields' home and Mr. Moore's cell phone and pager, which indicated as follows.[15] Mr. Wilkes returned to Topeka from Georgia in late November 1995, and phone calls to Mr. Moore from Ms. Fields' home began occurring on November 29, 1995 (Tr. 501-502). In December 1995, and January 1996, several phone calls were made from Ms. Fields' home to Mr. Moore's cell phone and pager (Tr. 500, 501, 503-506). Several calls were also placed from Mr. Moore's cell phone to Ms. Fields' home (Tr. 503-506).

On the date of the charged offenses, a call was made from Ms. Fields' home to Mr. Moore's pager number at 4:24 p.m. and 6:13 p.m. (Tr. 506). A call was made from Mr. Moore's cell phone to Ms. Fields' home number at 4:27 p.m. (Tr. 507). Mr. Moore evidently placed another call to Topeka on February 1, 1996, at 6:18 p.m. (Tr. 507). There were no phone calls made to Topeka "on or around the time the offense occurred" but there were other incoming calls with unknown numbers (Tr. 507-508).

In order to argue that Mr. Wilkes had not visited Toby Martin on the night of the charged offenses (February 1, 1996), the state also adduced evidence that: a call was placed from Ms. Fields' home to a phone number for Toby Martin on February 3, 1996, and a phone call was also made from Ms. Fields' home to Wichita on February 3, 1996, at 4:31 p.m. (Tr. 499-500, 508).

The state rested, and the trial court overruled defense counsel's motion for judgment of acquittal at the close of the state's case (Tr. 556-557, L.F. 26-27). The defense did not present evidence, and the trial court overruled defense counsel's motion for judgment of acquittal at the close of all the evidence (Tr. 557, 566-567, L.F. 28-29).

The jury returned verdicts of guilty of second degree murder, first degree assault, and two counts of armed criminal action and recommended life imprisonment for second degree murder, life imprisonment for first degree assault, and fifty years imprisonment for each count of armed criminal action (Tr. 606-607, L.F. 52-55). On August 4, 1998, the Honorable Lee E. Wells sentenced Mr. Wilkes to life imprisonment for Count I of second degree murder, fifty years imprisonment for Count II of armed criminal action, life imprisonment for Count III of first degree assault, and fifty years imprisonment for Count IV of armed criminal action (Tr. 610, 622-623, L.F. 66-67). Judge Wells ordered the sentence of Count I to run concurrently with the sentence of Count II, the sentence of Count III to run concurrently with the sentence of Count IV, and the sentences of Counts I and II to run consecutively to the sentences of Counts III and IV (Tr. 622-623, L.F. 66-67).

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[15] Ms. Fields testified that she never called Mr. Moore's cell phone or pager (Tr. 388).

Mr. Wilkes appealed his convictions and sentences to the Court of Appeals, Western District in State v. Edward L. Wilkes, WD# 56304 (L.F. 69-70). On appeal, Mr. Wilkes asserted that the trial court plainly erred in permitting "Amy Fields to testify that she found bullets in her glove compartment a few days after the shooting … and in permitting the state to question Fields about whether the bullets … were similar in appearance to [the bullets used in the crime]" (App.Br., WD# 56304, p. 8-12). The Court of Appeals declined to review that issue for plain error (Op., WD# 56304, p. 3). The Court of Appeals affirmed Mr. Wilkes' convictions and sentences and issued its mandate on December 23, 1999 (PCR L.F. 17, 33).

On March 3, 2000, Mr. Wilkes timely filed a pro se Rule 29.15 motion for postconviction relief (PCR L.F. 1-10). Thereafter, appointed counsel timely filed an amended motion on June 13, 2000 (PCR L.F. 15, 16-28).

In his amended motion, Mr. Wilkes alleged that he received ineffective assistance of counsel and specifically asserted as follows.

1) Trial counsel was ineffective for failing to call Russell Howard, a witness who testified favorably for the defense at Mr. Wilkes' first trial (PCR L.F. 17, 19-21). At Mr. Wilkes' first trial, Mr. Howard testified that at the date, time, and location of the charged offenses, he saw two men, who stood outside a vehicle, run from the vehicle immediately after shots were fired; the two men did not run to a car but rather ran across a parking lot until Mr. Howard lost sight of them (PCR L.F. 20). Two of the state's witnesses, Reece Good and Mr. Singleton, testified that the shooter ran to a blue Escort and Amy Fields testified that Mr. Wilkes was driving her blue Escort on the night of the offenses; Mr.

Howard's testimony thus would have contradicted the testimony of those state's witnesses and would have assisted Mr. Wilkes' defense that he was misidentified as the shooter and that Ms. Fields' blue Escort was misidentified as the car used by the shooter (PCR L.F. 19-21). Trial counsel was aware of Mr. Howard's statement and testimony and knew how to contact Mr. Howard, "as defense counsel had deposed Mr. Howard prior to [Mr. Wilkes'] first trial and had called Mr. Howard as a witness in [Mr. Wilkes'] first trial" (PCR L.F. 21).

2) Trial counsel was ineffective for failing to object to Ms. Fields' testimony that the bullets she discovered in the glove compartment of her Escort after the charged offenses were similar in size and color to a bullet and casing recovered from the crime scene (PCR L.F. 18, 21-23). Counsel objected to this evidence at the first trial, moved in limine to prevent the admission of this evidence at the second trial, and included the issue in his motion for new trial (PCR L.F. 18, 22). However, because counsel did not object to the admission of the evidence during the second trial, appellate counsel was forced to request plain error review of this issue on appeal (PCR L.F. 18, 21-23). The Court of Appeals declined to review the issue for plain error (PCR L.F. 21-23). Had counsel properly objected, Mr. Wilkes could have raised the issue under an "abuse of discretion" standard and the result of his direct appeal "would have been different" (PCR L.F. 18, 21-23).

On January 19, 2001, the motion court denied Mr. Wilkes' claims without an evidentiary hearing (PCR L.F. 32-35). Mr. Wilkes timely filed a notice of appeal on February 27, 2001 (PCR L.F. 38-39).

In Mr. Wilkes' appeal from the denial of postconviction relief, he argued that the motion court clearly erred in denying the aforementioned postconviction claims without a hearing (App.Br., WD# 59694, p. 18-28, 29-38). On October 23, 2001, the Court of Appeals affirmed the motion court's decision for the following reasons (Op., WD# 59694, p. 8).

With regard to Mr. Wilkes' claim that counsel was ineffective for failing to call Mr. Howard as a witness, Mr. Wilkes' postconviction counsel failed to properly allege in the amended motion that Mr. Howard was available for the second trial and what his testimony at the second trial would have been (Op., p. 5). Appellate counsel also failed to make this allegation in her brief (Op., p. 5). Although Mr. Wilkes "relies heavily on the fact that his first trial resulted in a hung jury as support for his contentions that his counsel's decisions in the second trial that varied from the first trial somehow amounted to ineffective assistance," he failed to offer any support, other than conclusory statements to this effect, for this argument (Op., p. 5). Further, Mr. Howard's testimony, if compared with the testimony of Mr. Singleton and Reece Good, was actually not in conflict (Op., p. 5-6).

With regard to the claim that counsel was ineffective for failing to object to Ms. Fields' testimony that the bullets she saw in her Escort were similar in size and color to a bullet and casing from the crime scene, the claim are "mere conclusions, not facts that if true would warrant relief" (Op., p. 8). Further, counsel's failure to object to Ms. Fields' testimony did not result in "substantial deprivation of [Mr. Wilkes'] right to a fair trial" (Op., p. 8).

On November 7, 2001, Mr. Wilkes timely filed a motion for rehearing, which was denied on December 4, 2001. On December 19, 2001, Mr. Wilkes timely filed an application for transfer with this Honorable Court. On January 22, 2002, this Court sustained Mr. Wilkes' application for transfer.

POINT I

The motion court clearly erred in denying Appellant's Rule 29.15 motion without granting an evidentiary hearing, because Appellant pleaded factual allegations, which, if proven, would warrant relief and which are not refuted by the record, in that Appellant claimed that he was denied his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, because trial counsel failed to call as a witness Russell Howard, who would have testified that he observed the two men involved in the shooting run, immediately after the shots were fired, across a parking lot until Mr. Howard lost sight of them. Appellant was prejudiced, because this evidence would have countered the state's evidence that the shooter left the scene in a blue Escort; Appellant was connected with a blue Escort on the night of the offenses, and this evidence would have assisted in his misidentification defense.

Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000);

State v. Colbert, 949 S.W.2d 932 (Mo. App. 1997);

Porter v. State, 596 S.W.2d 480 (Mo. App. 1980);

U.S. Const. Amends. VI, XIV;

Mo. Const., Art. I, Sec. 18(a);

Missouri Supreme Court Rule 29.15.

POINT II

The motion court clearly erred in denying Appellant's Rule 29.15 motion without granting an evidentiary hearing, because Appellant pleaded factual allegations, which, if true, would warrant relief and which are not refuted by the record, in that Appellant claimed that he was denied his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, because trial counsel failed to object to the testimony of state's witness, Amy Fields, that the bullets she saw in her Escort after Appellant had borrowed the car on February 1, 1996 (the date of the charged offenses) were similar in color and size to a fired copper bullet and casing recovered from the crime scene. Appellant was prejudiced; the state argued that the bullets were proof that Appellant committed the charged offenses, and had counsel timely objected, Appellant's convictions and sentences would have been reversed on direct appeal.

State v. Clay, 975 S.W.2d 121 (Mo. banc 1998);

State v. Wayman, 926 S.W.2d 900 (Mo. App. 1996);

State v. Franklin, 854 S.W.2d 55 (Mo. App. 1993);

U.S. Const. Amends. VI, XIV;

Mo. Const., Art. I, Sec. 18(a);

Missouri Supreme Court Rule 29.15.

ARGUMENT I

The motion court clearly erred in denying Appellant's Rule 29.15 without granting an evidentiary hearing, because Appellant pleaded factual allegations, which, if proven, would warrant relief and which are not refuted by the record, in that Appellant claimed that he was denied his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, because trial counsel failed to call as a witness Russell Howard, who would have testified that he observed the two men involved in the shooting run, immediately after the shots were fired, across a parking lot until Mr. Howard lost sight of them. Appellant was prejudiced, because this evidence would have countered the State's evidence that the shooter left the scene in a blue Escort; Appellant was connected with a blue Escort on the night of the offenses, and this evidence would have assisted in his misidentification defense.

In his amended motion, Mr. Wilkes alleged that his trial counsel was ineffective for failing to call Russell Howard, a witness who testified favorably for the defense at Mr. Wilkes' first trial (PCR L.F. 17, 19-21). At Mr. Wilkes' first trial, Mr. Howard testified that at the date, time, and location of the charged offenses, he saw two men, who stood outside a vehicle, run from the vehicle immediately after shots were fired; the two men did not run to a car but rather ran across a parking lot until Mr. Howard lost sight of them (PCR L.F. 20). Two of the state's witnesses, Reece Good and Mr. Singleton,

testified that the shooter ran to a blue Escort and Amy Fields testified that Mr. Wilkes was driving her blue Escort on the night of the offenses; Mr. Howard's testimony thus would have contradicted the testimony of those state's witnesses and would have assisted Mr. Wilkes' defense that he was misidentified as the shooter and that Ms. Fields' blue Escort was misidentified as the car used by the shooter (PCR L.F. 19-21). Trial counsel was aware of Mr. Howard's statement and testimony and knew how to contact Mr. Howard, "as defense counsel had deposed Mr. Howard prior to [Mr. Wilkes'] first trial and had called Mr. Howard as a witness in [Mr. Wilkes'] first trial" (PCR L.F. 21). Mr. Wilkes also asserted that, if a postconviction hearing were granted, he would call Mr. Howard at the hearing and provided Mr. Howard's address (PCR L.F. 21). The motion court denied this claim without an evidentiary hearing (PCR L.F. 33-35).

Appellate review of the motion court's decision is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(k). A motion court's findings and conclusions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo. banc 1991).

Rule 29.15(h) provides that an evidentiary hearing be held if it is requested and if the files and records of the case do not conclusively show that the movant is entitled to no relief. A movant is entitled to an evidentiary hearing if: 1) he alleges facts which would warrant relief, if true; 2) the allegations are not refuted by the record; and 3) the movant was prejudiced by the alleged errors. State v. Carey, 808 S.W.2d 861, 867 (Mo. App. 1991); State v. Watson, 806 S.W.2d 677, 680 (Mo. App. 1991).

The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). In order to have his convictions set aside, Mr. Wilkes must show that trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the existing circumstances and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Seales v. State, 580 S.W.2d 733, 736-737 (Mo. banc 1979). In order to show prejudice, Mr. Wilkes must show that counsel's omissions had a material effect, deleterious to him, on the outcome of the trial. Love v. State, 670 S.W.2d 499, 503 (Mo. banc 1984).

In his amended motion, Mr. Wilkes specifically asserted that:

> Trial counsel was ineffective for failing to call Russell Howard as a witness at Movant's trial. Mr. Howard was a crime scene eyewitness who testified at Movant's first trial, which resulted in a hung jury. Mr. Howard's testimony at Movant's first trial was favorable to Movant, and very likely contributed to the jurors' reasonable doubt as to Movant's guilt. Trial counsel was aware of Mr. Howard's account of

the shooting and knew how to contact him, as counsel had deposed Mr. Howard prior to Movant's first trial and had called him as a witness in Movant's first trial. Trial counsel's failure to call Mr. Howard as a witness in Movant's second trial, where Mr. Howard served as a witness in the first trial and the defense obtained a favorable result – a hung jury – fell below the level of skill, care, and diligence that a reasonably competent attorney would use in similar circumstances.

…

Movant was charged with walking up to a parked car and shooting the two men sitting inside the car – killing one and injuring the other. According to the State, immediately after the shots were fired, the shooter got into a blue Ford Escort and drove away. The State's principal evidence against Movant was the victim's identification of Movant and testimony from Amy Fields, Movant's girlfriend, that she loaned her blue Ford Escort to Movant on the night of the shooting. [Reece Good] also testified that [he] saw the shooter get into a blue Ford Escort and drive off.

Movant's theory of defense was that the victim misidentified Movant, as Movant was in Wichita, Kansas, on

the night of the shooting. Movant did not dispute that he occasionally drove Ms. Fields' blue Escort. He simply did not drive the Escort or any car to Kansas City on the night of the shooting. Thus, any evidence disputing the witness' claims, including their claim that the shooter was driving a blue Ford Escort, promoted Movant's defense.

At Movant's first trial, Russell Howard testified that he was an eyewitness to the shooting. He testified that he saw two people standing outside a vehicle, conversing with people inside. Mr. Howard heard two gunshots. He turned and saw the two people who had been standing outside the vehicle run away. They ran across a parking lot[,] and Mr. Howard lost sight of them. Mr. Howard did not see them enter a vehicle.

Mr. Howard's testimony differed from the version of events told by other witnesses. His account of what happened cast doubt on the claims of the other witnesses that the shooter got into a vehicle and drove off. Therefore, it was very likely that Mr. Howard's testimony contributed to the reasonable doubt that [at least one of the jurors] in Movant's first trial had about Movant's guilt.

Where Movant's defense at trial was that he was misidentified by the victim and that he was in Wichita,

> Kansas, at the time of the shooting, it was imperative for counsel to call any witnesses who cast doubt on Movant's presence at the crime scene. Mr. Howard was a witness whose testimony differed from other eyewitnesses and whose testimony supported Movant's defense that he was not in Kansas City with a blue Ford Escort at the time of the shooting.

(PCR L.F. 17, 19-21). Mr. Wilkes also alleged that, if granted a postconviction hearing, he would call Mr. Howard as a witness and provided Mr. Howard's address (PCR L.F. 21).

The aforementioned allegations are sufficiently factual in nature to warrant an evidentiary hearing. The allegations are also not refuted by the record.

Further, these allegations, if proven, warrant relief under the law. Trial counsel must make a reasonable effort to present evidence and witnesses that would establish a defense. Porter v. State, 596 S.W.2d 480, 482 (Mo. App. 1980). A competent attorney's duty is to utilize every effort to persuade witnesses who possess material facts and knowledge of an event to testify. Perkins-Bey v. State, 735 S.W.2d 170, 171 (Mo. App. 1987), citing Thomas v. State, 516 S.W.2d 761, 764 (Mo. App. 1974). The failure to present even a single piece of important evidence may demonstrate ineffectiveness and prejudice sufficient to warrant a new trial. Clay v. State, 954 S.W.2d 344, 349 (Mo. App. 1997).

The motion court denied the claim and found that:

> … movant was not prejudiced due to the fact that, "conjecture or speculation as to the potential testimony of a witness is not enough to establish the required prejudice." State v. Buzzard, 909 S.W.2d 370 (Mo.App.S.D. 1995). In addition, considering Movant's motion, "failing to present cumulative evidence is not ineffective assistance of counsel." State v. Twenter, 818 S.W.2d 628 (Mo. banc 1991); Flowers v. State, 776 S.W.2d 444, 448 (Mo.App. 1989); Robinson v. State, 760 S.W.2d 516, 517 (Mo.App. 1988). Finally, the Court finds that whether or not "to call a witness is a matter of trial strategy and not the basis for overturning a conviction unless the movant clearly establishes otherwise." State v. King, 865 S.W.2d 845 (Mo.App.W.D. 1993); Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). In the present matter by no means has the movant established otherwise. …

(PCR L.F. 33-34).

The motion court's findings are clearly erroneous. First, the motion court held that the claim should be denied without a hearing, because "conjecture or speculation as to the potential testimony of a witness is not enough to establish the required prejudice" (PCR L.F. 33). However, in this case, Mr. Wilkes was not at all speculating what Mr. Howard's testimony would be; rather, he alleged precisely what Mr. Howard's "account

of the shooting" was and further specifically alleged what Mr. Howard's testimony was at the first trial (PCR L.F. 19-21).

Second, the motion court held that the claim should be denied, because "failing to present cumulative evidence is not ineffective assistance of counsel" (PCR L.F. 33). However, in this case, Mr. Howard's testimony would not have been cumulative evidence. There was no other evidence presented that the perpetrators did anything other than run directly to a silver or blue Escort (or a car similar to an Escort), which was parked across the street and approximately two to three car lengths from the Mr. Moore's Toyota Tercel (Tr. 160, 197, 350-351, 353-354, 356). As such, where Mr. Wilkes was placed (by his girlfriend, Ms. Fields) in her blue Escort on the night of the shooting and where Mr. Singleton identified Ms. Fields' blue Escort as the shooter's car, it was imperative to call Mr. Howard, who would have been the only witness to tell the jury that the perpetrators ran from the crime scene and did not leave the scene in a car (Tr. 190-191, 381-382, 384-385, 387, St. Exs. 48-51).

Third, the motion court held that the claim should be denied, because the decision "to call a witness is a matter of trial strategy and not the basis for overturning a conviction unless the movant clearly establishes otherwise" (PCR L.F. 33). In this case, it was impossible to find that defense counsel's decision was a result of "trial strategy" based on the record alone. The record, in fact, supports a finding that counsel's strategy included attempts to cast doubt on any claims that the shooter left the crime scene in a blue Escort. A review of counsel's cross-examination of Reece Good, a crime scene eyewitness, demonstrates this. After Reece Good testified on direct examination that

after he heard shots fired, he saw two men run to and leave the area in a silver or light blue Ford Escort hatchback, defense counsel adduced the following on cross-examination (Tr. 350-351).

> Q [by defense counsel] Two and a half years ago on that occasion you told Detective Cline right afterwards when he came out to the scene – do you remember talking to him there?
>
> A [by Reece Good] Yes.
>
> Q All right. And you remember saying that you saw a small like a Ford or Dodge Omni-styled vehicle; you told that to Detective Cline, didn't you?
>
> A Yes.
>
> Q And being kind of boxy in shape; isn't that right?
>
> A Yeah, probably. I don't remember saying boxy.
>
> Q That's what the report says, right?
>
> A Yeah.

(Tr. 353-354). Defense counsel also adduced evidence during his cross-examination of Detective Headrick that in addition to the "suspect vehicle" being described as a blue Ford Escort, there were at least three other types of cars described as the "suspect vehicle" (Tr. 537, 540).

Further, this testimony by Mr. Howard could have made a difference in the outcome of Mr. Wilkes' trial. Mr. Wilkes' first trial resulted in a hung jury, and this jury

deliberated for three and one-half hours (Tr. 603, 606, L.F. 17-18, 1st Tr. 490). The primary evidence of guilt was Mr. Singleton's identification of Mr. Wilkes as the shooter; without that evidence, the State would not have made its case. And Mr. Singleton's identification of Mr. Wilkes was questionable for several reasons. Mr. Singleton failed to mention to the police, to hospital staff, or to anyone, until four days after the shooting (February 5, 1996) or a week after the shooting (February 8, 1996)(and he was alert two days after the shooting) that he knew the shooter or had seen the shooter before, even though he had seen Mr. Wilkes on two occasions approximately two to four months before the shooting and had been to Mr. Wilkes' home (Tr. 163, 202, 204, 206, 207, 208, 221, 225, 227-228, 240, 275, 276, 297, 381, 429-430, 474, 483, 501-502). Mr. Singleton admitted drinking alcohol (though he testified that he only drank a "sip") and smoking marijuana prior to the shooting and also admitted that his hospital records reflected that he tested positive, immediately after the shooting, for the presence of opiates and marijuana (Tr. 181-182, 213, 216, 219, 220).

Also, Mr. Singleton testified that, right before the shooting (which occurred at night), he saw the two men approach the car but only "glanced" at them (Tr. 233). Both of the men were wearing stocking caps and coats (Tr. 234, 273-275). The shooter said "hey, man" and then immediately shot Mr. Moore and Mr. Singleton; "[e]verything, it just happened so quickly" (Tr. 190-191, 196-197, 234, 278). Although Mr. Singleton testified that immediately after he was shot, he "connected eyes" with the shooter through the "side window," he previously made a statement that he saw the shooter, after the shooting, through the "back [big] window" (Tr. 193, 197, 279-281, 284, 285-286).

Under these circumstances, the evidence of guilt was not overwhelming. Clearly, evidence that *a disinterested party* saw the two men run, after the shooting, across a parking lot until they disappeared from sight, and *not run to an Escort*, would have strengthened Mr. Wilkes' defense (where other evidence established that Mr. Wilkes was driving a blue Escort on the night of the offenses). There is a reasonable probability that this could evidence could have resulted in a different outcome of Mr. Wilkes' case.

Nevertheless, the Court of Appeals, relying primarily on Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000), held that the motion court was correct and provided similar reasons why no hearing was necessary on Mr. Wilkes' claim (Op., p. 3-6).

In Morrow, this Court affirmed a postconviction court's denial of relief without a hearing. Id. at 824. In his amended motion, Morrow's postconviction counsel asserted that trial counsel was ineffective for failing to investigate and adduce evidence of certain mitigating factors of Morrow's life. Id. at 823. Morrow's postconviction counsel provided the court with a narrative of Morrow's background, including incidents of physical abuse and violence. Id. Morrow's postconviction counsel then listed the names of twenty-four witnesses who would testify in support of the postconviction claim. Id. This Court held that Morrow's postconviction counsel did not allege sufficient facts to warrant a hearing, because:

> Appellant did not allege that any listed witness was available to testify or that the witness would have testified if he or she had been called to do so. Appellant did not connect a specific portion of appellant's narrative to a particular

> witness. It is impossible, therefore, to determine whether any of the individual witnesses would have provided mitigating evidence through their testimony. …

Id. This Court stated further that the amended motion was deficient in other respects as well and that "pleading requirements are not merely technicalities." Id. at 824. "The purpose of a Rule 29.15 motion is to provide the motion court with allegations sufficient to enable the court to decide whether relief is warranted." Id.

This case is distinguishable from Morrow. Mr. Wilkes' postconviction counsel clearly provided the motion court with allegations sufficient to enable the court to decide whether relief was warranted. The motion court was aware, from the claims in the amended motion, that: trial counsel had deposed Mr. Howard, trial counsel had called Mr. Howard as a witness at the first trial, the first trial resulted in a hung jury, Mr. Howard had provided testimony on at least two prior occasions that the perpetrators ran from the crime scene and did not leave the crime scene in a Ford Escort or similar car, and Mr. Howard's testimony would have contradicted the testimony of state's witnesses (who testified that the perpetrators ran to a blue Escort) and would have assisted Mr. Wilkes' misidentification defense (where Mr. Wilkes was connected with a blue Escort on the night of the offenses) by showing that Mr. Wilkes was misidentified by Mr. Singleton and Ms. Fields' Escort was misidentified as the car used by the shooter (PCR L.F. 17, 19-21).

Where, as here, the amended motion alleged that a disinterested party provided certain testimony on two prior occasions and specifically alleged what that witness

testified to, does the motion really need to explicitly state that the witness would so testify again? Can't it be assumed that the witness would again be brought into court by subpoena and testify as he did before? One could try to come up with reasons why Mr. Howard might testify differently – he now cannot recall or he now does not wish to assist the defense – but according to rules of evidence, his recollection could be refreshed or his prior testimony could come in as substantive evidence pursuant to Section 491.074, RSMo 2000. Are the pleading requirements for a postconviction motion so rigorous that it is not possible for a fact to be implicitly alleged in an amended motion?

In State v. Colbert, 949 S.W.2d 932 (Mo. App. 1997), the defendant appealed the denial of postconviction relief without an evidentiary hearing. Id. at 983. On appeal, the defendant argued that he alleged sufficient facts to warrant an evidentiary hearing on the issue of whether his trial counsel was ineffective by failing to convey a plea offer. Id. at 946. The State argued that the defendant did not allege sufficient facts because the defendant failed to allege that the trial court would have accepted the plea agreement. Id. The Court of Appeals held that the defendant did allege sufficient facts to warrant a hearing:

> Appellant contends that if he had been advised of the plea agreement, he would have accepted it, he would have been sentenced in accordance with the plea agreement, and he would be serving less time than he is now. It goes without saying that a defendant cannot serve a lesser sentence under a plea agreement unless the court actually accepts the plea

> agreement. From this allegation of prejudice, *we find it is implicit that the appellant is alleging that the trial court would have accepted the agreement.*

Id. (emphasis added).

Likewise, from Mr. Wilkes' allegation of prejudice (i.e. how Mr. Howard's testimony would have made a difference in the outcome of his case and would have assisted Mr. Wilkes' misidentification defense at his trial), it goes without saying that Mr. Wilkes was alleging that Mr. Howard would have provided the same testimony at the second trial that he had provided before and that he would have been brought into court as he had before.

For all the reasons stated above, Mr. Wilkes respectfully requests that this Court reverse the motion court's decision and remand the case for an evidentiary hearing on the aforementioned postconviction claim.

ARGUMENT II

The motion court clearly erred in denying Appellant's Rule 29.15 motion without granting an evidentiary hearing, because Appellant pleaded factual allegations, which, if true, would warrant relief and which are not refuted by the record, in that Appellant claimed that he was denied his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, because trial counsel failed to object to the testimony of state's witness, Amy Fields, that the bullets she saw in her Escort after Appellant had borrowed the car on February 1, 1996 (the date of the charged offenses) were similar in color and size to a fired copper bullet and casing recovered from the crime scene. Appellant was prejudiced; the state argued that the bullets were proof that he committed the charged offenses, and had counsel timely objected, Appellant's convictions and sentences would have been reversed on direct appeal.

In his amended motion, Mr. Wilkes alleged that trial counsel was ineffective for failing to object to Ms. Fields' testimony that the bullets she discovered in the glove compartment of her Escort after the charged offenses were similar in size and color to a bullet and casing recovered from the crime scene (PCR L.F. 18, 21-23). Counsel objected to this evidence at the first trial, moved in limine to prevent the admission of this evidence at the second trial, and included the issue in his motion for new trial (PCR L.F. 18, 22). However, because counsel did not object to the admission of the evidence during the second trial, appellate counsel was forced to request plain error review of this issue on

appeal (PCR L.F. 18, 21-23). The Court of Appeals declined to review the issue for plain error (PCR L.F. 21-23). Had counsel properly objected, Mr. Wilkes could have raised the issue under an "abuse of discretion" standard and the result of his direct appeal "would have been different" (PCR L.F. 18, 21-23). The motion court denied this claim without an evidentiary hearing (PCR L.F. 50-53).

Appellate review of the motion court's decision is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(k). A motion court's findings and conclusions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo. banc 1991).

Rule 29.15(h) provides that an evidentiary hearing be held if it is requested and if the files and records of the case do not conclusively show that the movant is entitled to no relief. A movant is entitled to an evidentiary hearing if: 1) he alleges facts which would warrant relief, if true; 2) the allegations are not refuted by the record; and 3) the movant was prejudiced by the alleged errors. State v. Carey, 808 S.W.2d 861, 867 (Mo. App. 1991); State v. Watson, 806 S.W.2d 677, 680 (Mo. App. 1991).

The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). In order to have his convictions set aside, Mr. Wilkes must show that trial

counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the existing circumstances and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Seales v. State, 580 S.W.2d 733, 736-737 (Mo. banc 1979). In order to show prejudice, Mr. Wilkes must show that counsel's omissions had a material effect, deleterious to him, on the outcome of the trial. Love v. State, 670 S.W.2d 499, 503 (Mo. banc 1984).

The failure to object to prejudicial testimony can constitute ineffective assistance of counsel, but "[t]he failure to object to objectionable evidence does not establish ineffective assistance of counsel unless the evidence resulted in a substantial deprivation of the accused right to a fair trial." State v. Radley, 904 S.W.2d 520, 525 (Mo. App. 1995). "Defendants may be held to the consequences of counsel's failure to object, whether the failure is the result of a strategic decision, or is due to inadvertence." Jones v. State, 784 S.W.2d 789, 793 (Mo. banc 1990). The fact that a meritorious objection was not made does not necessarily establish an ineffective assistance of counsel claim. Id. "There must be a showing that counsel's overall performance fell short of established norms and that this incompetence probably affected the result." Id. "The movant must prove that a failure to object was not strategic and that the failure to object was prejudicial." State v. Clay, 975 S.W.2d 121, 135 (Mo. banc 1988).

In his amended motion, Mr. Wilkes asserted that:

> Trial counsel was ineffective for failing to object to Amy Fields' testimony about discovering bullets in the glove

compartment of her car a few days after she loaned her car to Movant. Counsel's failure to object to this testimony during Movant's trial forced Movant's appellate counsel to request that the Court of Appeals review the admission of this irrelevant, prejudicial testimony for plain error, rather than abuse of discretion. This heightened standard of review created an insurmountable hurdle for Movant. Had Movant been able to raise this claim as an abuse of discretion, the results of Movant's appeal would have been different.

During Movant's trial, Amy Fields was questioned by the prosecutor as follows:

Q: Did you ever find anything unusual in your car after that night that Mr. Wilkes took your car on the 1st?

A: Yes.

Q: What was it that you found?

A: I found some bullets.

Q: Where were these bullets found?

A: In the glove compartment.

Q: How would you describe these bullets?

A: I didn't really look at them all that well. I opened my glove compartment and saw them, because I cleaned out my car the next day. I just kind of noticed them laying there.

There was two of them and I couldn't tell you if they were full bullets, if they were shot. I don't know. I looked at them and kind of like, huh, and closed the thing.

(Tr. 394-395).

The State continued questioning of Ms. Fields about the appearance of the bullets she saw, and whether the bullets marked as State's Exhibits "looked familiar" to her (Tr. 395-396). Defense counsel did not object, during trial, to Amy's testimony about bullets she saw (Tr. 394-396).

Trial counsel was aware of the irrelevant and prejudicial nature of Ms. Fields' bullet testimony. Prior to Movant's first trial, counsel filed a motion *in limine* asking the court to prohibit the State from eliciting any testimony from Ms. Fields about the bullets she found. Trial counsel also made a contemporaneous objection to this testimony during Movant's first trial. However, inexplicably, trial counsel failed to object to this same testimony during Movant's second trial. Counsel asked for a pre-trial ruling on this evidence, and later preserved the issue of the admission of the bullet testimony in Movant's motion for new trial. However, because no contemporaneous objection was made

> during trial, the standard of review on this issue was plain error.
>
> … Had counsel objected to this testimony … during Movant's trial, the Court of Appeals would have reviewed this claim for abuse of discretion, and the outcome of Movant's appeal would likely have been different.
>
> …
>
> …[T]he Court of Appeals found that since this issue … had not been properly preserved, they were not obligated to review it. Had trial counsel properly preserved this claim, as he did in Movant's first trial, the results of Movant's appeal would have been different.

(PCR L.F. 21-23).

The aforementioned allegations are sufficiently factual in nature to warrant an evidentiary hearing. These allegations are also not refuted by the record.

Further, Mr. Wilkes' allegations, if proven, warrant relief under the law. In this case, the failure to object constituted ineffective assistance of counsel, because the admission of Ms. Fields' testimony (that she found bullets in her car after Mr. Wilkes borrowed it on the date of the shooting and that the bullets were similar in color and size to a fired bullet and shell casing recovered from the crime scene) resulted in a substantial deprivation of Mr. Wilkes' right to a fair trial. As asserted in Mr. Wilkes' direct appeal

brief, Ms. Fields' testimony was irrelevant and highly prejudicial (App.Br., WD# 56304, p. 8-12).

Evidence is relevant if it tends to prove a fact in issue or corroborates other relevant evidence which bears on a principal issue in the case. State v. Wayman, 926 S.W.2d 900, 905 (Mo. App. 1996). Whether evidence is relevant and whether its probative value outweighs its prejudicial effect are matters for the trial court to decide, and the trial court's determination will only be reviewed on appeal for an abuse of discretion. Id. at 905, citing State v. Franklin, 854 S.W.2d 55, 58 (Mo. App. 1993). Even if the evidence is relevant, it should be excluded if the prejudicial effect on the jury is wholly disproportionate to its probative value, State v. Thompson, 856 S.W.2d 109, 111 (Mo. App. 1993), or if the prejudicial effect of the evidence outweighs the considerations that make the evidence useful to prove an issue in the case. State v. Meder, 870 S.W.2d 824, 831 (Mo. App. 1993).

> Testimony that Amy Fields [briefly saw] bullets resembling [a fired bullet and shell casing from the crime scene] … in her car shortly after the shootings was not relevant because it did not prove any of the facts in dispute at Mr. Wilkes' trial. First, the testimony about the bullets was so vague that it had virtually no probative value. Amy Fields described the bullets as "medium size" and copper-colored (Tr. 395, 419). She said that they looked similar to a round that could be created by combining State's Exhibits 30 and

40, a nine millimeter bullet and nine millimeter shell casing [recovered from the crime scene] (Tr. 395-396).

The description did little, if anything, to show that the two bullets found in Fields' car were somehow related to the shootings of Kenneth Moore and Gary Singleton. Any medium-size copper shell casing with a copper-jacketed bullet undoubtedly would look similar to the bullets that Fields found in her car. Fields did not profess to have any specialized knowledge of guns or ammunition, and could not describe the caliber of the bullets in her car, beyond saying that they were "medium size" (Tr. 395). The bullets that Fields saw in her car were never recovered, so there was no way for the state to connect them to the shooting via ballistics testing. There was simply no link between the bullets in the glove box and the shootings of February 1, 1996, other than the fact that Fields had loaned her car to Mr. Wilkes on February 1, 1996. This was not enough to imbue the bullets in the glove box with any probative value for the charges pending against Mr. Wilkes.

… [H]owever, the prejudicial effect of the evidence was great, in this at least partially circumstantial evidence case. Gary Singleton claimed that he recognized the shooter

as Edward Wilkes, but his identification testimony was attacked on cross-examination by defense counsel (Tr. 272-276). The prejudice from the evidence that Fields found ammunition in her car after she loaned it to Mr. Wilkes was wholly disproportionate to its limited probative value.

(App.Br., WD# 56304, p. 11-12).

The motion court denied this claim because:

> …the Court finds that it is a presumption that a failure to object to a line of questioning is trial strategy. State v. McVay, 852 S.W.2d 408, 415 (Mo.App.E.D. 1993); Walls v. State, 779 S.W.2d 560, 562 (Mo. banc 1989). Notwithstanding trial strategy, counsel's failure to make even a meritorious objection does not, in itself, demonstrate incompetence. State v.Tokar, 913 S.W.2d 753 (Mo.App. 1995). There must be a showing that counsel's overall performance fell below established norms and that this incompetence affected the result. State v. Jones, 784 S.W.2d 789 (Mo. banc 1990). Movant's allegations, even if true, do not rise to the level of incompetence on the part of trial counsel. Furthermore, movant has failed to prove by a preponderance of the evidence that counsel's deficient performance prejudiced movant so as to create a reasonable

> probability that the result of the trial would have been different. Therefore the above allegations fall into the category of "procedural default" and preclude the movant from relief. Jones, 784 S.W.2d at 793. Accordingly, the point is overruled.

(PCR L.F. 34).

The Court of Appeals, Western District affirmed the motion court's decision (Op., p. 6-8). However, the motion court's decision is clearly erroneous. First, it was impossible to find that trial counsel's decision was a result of "trial strategy" based on the record alone. In fact, the record supported his allegation that counsel wanted to keep this harmful evidence out (Tr. 130-136, L.F. 63-64). And Mr. Wilkes alleged in his postconviction motion that his trial counsel objected to the evidence at the first trial, asked the court, before trial, to keep the evidence out, and included the issue in his motion for new trial (PCR L.F. 22). Mr. Wilkes also alleged that counsel was thus aware of the irrelevant and prejudicial nature of the testimony (PCR L.F. 22)

Further, Mr. Wilkes alleged that he was prejudiced, because the Court of Appeals would have reached a different result had trial counsel objected, during trial, to the challenged testimony (PCR L.F. 23). Clearly, the evidence was extremely prejudicial, because the jury would have speculated that the bullets found in Ms. Fields' car, shortly after the shooting, were bullets Mr. Wilkes took with him to use in the shooting, since they were allegedly the same type as those used in the shooting.

As such, Mr. Wilkes was entitled to an evidentiary hearing on this postconviction claim. Mr. Wilkes respectfully requests that this Court reverse the decision of the motion court and remand the case for an evidentiary hearing.

CONCLUSION

Based on the Arguments herein, Appellant respectfully requests that this Court reverse the motion court's decision denying his Rule 29.15 motion without an evidentiary hearing and remand the case for an evidentiary hearing.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Jeannie M. Willibey, hereby certify as follows:

1. The attached brief complies with the limitations contained in this Court's Special Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 12,652 words, which does not exceed the 31,000 words allowed for an appellant's brief.
2. The floppy disk filed with this brief contains a copy of the brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on March 6, 2002. According to that program, this disc is virus-free.
3. One disk and two true and correct copies of the above and foregoing were mailed, postage prepaid, to Mr. Andrew Hassell and Mr. Breck K. Burgess, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri, on this 12th day of March, 2001.

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Jeannie Willibey